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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1011

CATALANO INC., et al.,
Petitioners,

vs.

TARGET SALES INC., et al.,
Respondents.

Brief of Respondents D & D Beverage Co. and M & T Distributing Co. In Opposition to Petition for a Writ of Certiorari

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Respondents D & D Beverage Co. and M & T Distributing Co. adopt by reference and join in the briefs filed by respondents Donaghy Sales, Inc., and Target Sales, Inc., in opposition to the petition for certiorari. However, in light of the amici curiae briefs filed by the United States and by various states in support of the petition, respondents urge that the following points be particularly considered by this Court in deciding whether to hear this case or not to hear it.

ARGUMENT

A. California's Regulatory Plan Does Not Involve Wholesale Price Maintenance for Beer

Contrary to statements by plaintiff and by amici curiae, wholesale beer pricing in California does not involve governmentally imposed price maintenance. Wholesale beer pricing is not akin to the fair trade schemes condemned by California courts in *Rice v. Alcoholic Beverage Control Appeals Board*, 21 C.A.3d 431 (1978), and *Capiscean Corp. v. Alcoholic Beverage Control Appeals Board*, 87 C.A.3d 996 (1979). Nor is it akin to vinter control of the prices of wholesalers, condemned by this Court a few days ago in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, ... U.S. ....., Docket No. 79-97. As pointed out in the Donaghy brief, the applicable California provisions do not eliminate price competition in wholesale sales of beer. (Please see California *Business & Professions Code* Sections 25000-25004, set forth in Appendix 1 to the Donaghy brief). The sections merely require that wholesalers post a schedule of prices and adhere to the schedule, but the schedule may be amended at any time. Amendments are common. Amendments are dictated by competitive pressures in the market. Amendments are effective 10 days after filing, except that amendments to meet lower competitive prices may be effective immediately.

Petitioner and amici suggest that posted price lists are published in trade journals. Respondents respectfully submit that they have been in the wholesale beer business for many years, and that to the best of their knowledge, price filings by individual beer wholesalers are not and never have been published in any trade journal.

As also pointed out in the Donaghy brief, there is substantial evidence that Fresno beer wholesalers sold beer at differing prices, that price movements were not uniform, and that price competition did exist. However, the real significance of the price schedule annexed to the Donaghy brief is not that there was price competition before the withdrawal of credit in 1967, but rather, that the price competition continued after that time. There is nothing in the record in this case which indicates that the withdrawal of credit affected price competition. There was price competition before the withdrawal, and there continued to be price competition after it. Price changes occur frequently.

B. The Ninth Circuit Followed Guidelines Articulated by This Court

The most compelling reason for not granting certiorari herein is that the Ninth Circuit simply followed the guidelines already articulated by this Court. (*Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097). The rationale of the petitioners and amici herein is that price is credit and credit is price, and accordingly the *per se* rule applies. However, the lesson by this Court in *Broadcast Music, Inc. v. Columbia Broadcast System*, 441 U.S. 1 (1979) is that "literalness is overly simplistic and often overbroad". It seems to us that the rationale of this Court in *Broadcast Music*, as well as in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) is that the *per se* rule is not to be applied blindly, but instead, in light of the economic realities of the marketplace. The economic realities of the Fresno area marketplace are that price competition has continued.

The Ninth Circuit's observations that "competition could be fostered" by the agreement to eliminate credit also coincides with the realities of the marketplace. There is deposition testimony by a beer wholesaler in this case that he and the other wholesalers "were getting slaughtered" by credit losses before credit was withdrawn. There is deposition testimony by another wholesaler (M & T Distributing Co.) that its business could not have survived without withdrawal of credit in the marketplace. In other words, there is substantial evidence in the record that the smaller wholesalers would have disappeared if credit had not been withdrawn.[1] The effect of their disappearance would have lessened competition, pricewise and otherwise.

Credit may be "price", although more likely so in a long-term rather than a short-term setting.[2] Free advertising, free delivery, and free stocking of retailers' shelves also

[1]Two of the smaller wholesalers did subsequently "go under" notwithstanding withdrawal of credit, but they were able to stay alive for approximately five years. One, respondent M & T Distributing Co., was able to survive and is a viable business today.

[2]The record herein includes an analysis of the credit extended by respondent D & D Beverage Co. in 1967. Out of the total of 1,268 businesses to which D & D sold beer in 1967, only 379 businesses, or 29.9% of the total, regularly received credit. The terms of credit varied from 5 to 30 days. Of the 379 businesses which received credit, 269 (71%) received credit for 20 days or less, and 152 (40%) received credit for 15 days or less.

may be "price". But again, depending on the circumstances, the contrary may be true. The flexible approach opted-for by the Ninth Circuit simply reflects this Court's own approach.

Respectfully submitted,
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